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**IN THE OFFICE OF THE UTAH STATE ENGINEER**

**UTAH DIVISION OF WATER RIGHTS**

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In the matter of the	)	
APPLICATION OF SALT LAKE CITY	)	<b>MEMORANDUM OF PROTESTANTS,</b>
SUBURBAN SANITARY DISTRICT	)	<b>LOWER JORDAN RIVER WATER USERS</b>
NO. 1 to appropriate waters of the	)	<b>IN OPPOSITION TO APPLICATION</b>
State of Utah. #57-10097 (A68488)	)	

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The Lower Jordan River Water Users, a group of water rights owners composed of private waterfowl hunting clubs, private irrigators, and PacifiCorp, owning water rights on the lower Jordan River, hereby respond to the Memorandum in Support of Application to Appropriate water filed by the Salt Lake City Suburban Sanitary District No. 1 (the "District") on October 31, 1995.

**I. THE APPLICATION SHOULD BE DENIED BECAUSE**

**THERE IS NO UNAPPROPRIATED WATER IN THE SOURCE**

The District seeks to appropriate 22.213 cfs of water tributary to the Jordan River from sewage effluent and from intercepted ground water. The Utah State Engineer's office has treated the Jordan River drainage as fully appropriated for many years. UTAH CODE ANN. §73-3-8(1)

sets forth the "duty" of the State Engineer with respect to approving applications if there is unappropriated water in the proposed source and the new application does not impair existing rights or interfere with the more beneficial use of the water. In reviewing the application, if the State Engineer has reason to believe that approving the application will interfere with the

"more beneficial use for irrigation, domestic or culinary, stock watering, power or mining development or manufacturing, or will unreasonably affect public recreation or the natural stream environment, or prove detrimental to the public welfare, it is his duty to withhold his approval or rejection of the application until he has investigated the matter. If an application does not meet the requirements of this section, it shall be rejected." [emphasis added]

To determine that there is sufficient unappropriated water available in the Jordan River to grant the application, the State Engineer first must compare the existing water rights downstream of the applicant's point of diversion to the available flow in the source. If the source flow is adequate to fill downstream rights, the State Engineer next should review pending applications and the effect their approval would have on any remaining source flow. Only after this review demonstrates that water in the source is available in priority should the State Engineer grant a new application.

Through almost 100 years of use of water on the lower Jordan River, the Lower Jordan River Water Users have come to understand the river, water flows, and, most importantly, water shortages. In almost every year, water is unavailable to fully satisfy their existing rights during high demand periods. In order to share the burden of insufficient water supply occurring during many years, the Lower Jordan River Water Users pass resolutions dividing water between the Surplus Canal and the Jordan River when the flow is below 325 cfs. The 325 cfs is a minimum

requirement and does not fully supply existing rights. Records from the Lower Jordan River Commissioner's reports attached to the March 18, 1996 memorandum of the protestant Lakefront Gun, Fur, & Reclamation Club, Inc. indicate that during the last five years, this 325 cfs flow was met less than 25% of the time.

An analysis of the flows in the Jordan River and Surplus Canal for the past 50 years, attached hereto as Exhibit "A," which includes extended flood periods such as the 1980's as well as droughts, shows that a flow of 325 cfs is available during July and August only 55% of the time. In other words, the 325 cfs flow is not attainable 45% of the time in those months. In dry years, this deficit will be much larger and extend for a longer period. Clearly, if the early priority water rights of the Lower Jordan River Water Users do not receive a full supply, there is insufficient water in the source to approve a new, significant application of 22.213 cfs.

Simply because the water sought to be appropriated is sewage effluent does not elevate the application to a special status requiring the State Engineer to violate long-standing principles of the appropriation doctrine and Utah law. This was a central issue in the two year debate over enactment of Chapter 3c of Title 73, "Conservation and Use of Sewage Effluent." However, in enacting UTAH CODE ANN. §73-3c-6, sewage effluent and its would be appropriators were provided no unusual and preferential treatment by the Utah Legislature. It states:

If a portion of the sewage inflow to any POTW consists of any unappropriated water of the state, the person owning or administering the POTW or any other person may apply to the state engineer to appropriate the water to a beneficial use.

The District contends that even if the basin is fully appropriated, it should still have the right to appropriate water imported into the basin. If some amount of import water is entering the District's collection facilities, the District has made no attempt to quantify it. If it is water delivered from the Central Utah Project, the United States claims the return flows by contract with those entities it supplies. Even assuming that import water can be distinguished, under no circumstances should the District be allowed to appropriate any portion of that water unless the prior existing rights of the Jordan River Water Users will not be interfered with or impaired.

In addition to arguing that import water exists in the basin, the District urges the State Engineer to ignore the Utah Legislature and follow the rulings of the Arizona courts. The District urges that the sewage effluent it releases should be appropriatable in Utah because it is appropriatable in Arizona. However, this position is contrary to new Chapter 3c of Title 73. Arizona's system of appropriation of sewage effluent is entirely different than Utah's. The Utah Legislature considered Arizona's approach, which was to create a new category of water, and rejected it. For the State Engineer to approve the District's application now would fly in the face of Legislative intent and violate the law.

The sewage effluent collected, conveyed and treated by the District historically constituted part of the return flow to the Jordan River used to supply the early priority rights of the Lower Jordan River Water Users. In addition, the Lower Jordan River Water Users claim that intercepted groundwater flowing into the District's pipes is also contributory to flows in the lower Jordan River, upon which they have historically relied. Storm water collected in the

District's system historically would have flowed in streams and channels to the Jordan River, or percolated into the ground and seeped into the river, contributing significantly during storm events to Jordan River flows. Allowing the District to appropriate water from any of these three sources cannot be accomplished without interfering with the water rights of the Lower Jordan River Water Users.

## **II. THE DISTRICT'S APPLICATION SHOULD BE DENIED BECAUSE IT CANNOT CLAIM A BENEFICIAL USE FOR THE WATER**

The District's application to appropriate water should be denied because the water is not being appropriated for a beneficial use. Chapter 3c of Title 73 of the UTAH CODE ANN. requires that an appropriation of sewage effluent be for "a beneficial use." The District's application proposes to use the water for sewage "collection, transport, treatment and reuse." Historically, these have not been considered beneficial uses for which appropriation is required or allowed. In *Lake Shore Duck Club v. Lake View Duck Club*, 166 P. 309 (1917), the Utah Supreme Court discussed the concept of beneficial use, explaining that "for the purpose of effecting a valid appropriation of water...the beneficial use contemplated in the appropriation must be one that inures to the exclusive benefit of the appropriator." 166 P. at 311.

Here, the beneficial use the District is claiming is illusory, in that the District gains no benefit from the actual appropriation of water. It already enjoys all benefits it can claim under an appropriation through its statutory relationship with its customers. The only conceivable advantage to the District in successfully appropriating the water it is already using would be its

ability to file a change application to avoid discharging its effluent into the Jordan River, which, without question, would harm the Lower Jordan River Water Users Association users by diminishing the water in the Jordan River available to satisfy their prior rights.

The District's application should be denied because the benefit gained through sewage collection, transport, treatment and reuse is enjoyed by the public at large and not by the District. The Court in *Lake Shore Duck Club* stated, "it is utterly inconceivable that a valid appropriation of water can be made under the laws of this state, when the beneficial use of which, after the appropriation is made, will belong to every human being who seeks to enjoy it." 166 P. at 310. Like the use of water for the propagation of wildlife in the *Lake Shore Duck Club* case, the benefits of treated effluent water are not consistent with private ownership; rather, they are enjoyed by all who use the water to transport their sewage.

Additionally, the water treated by the District is returned to the Jordan River drainage where the benefits of the treated water will be available to all who use the drainage. As the Court in *Lake Shore Duck Club* stated, "if the beneficial use for which the appropriation is made cannot, in the nature of things, belong to the appropriator, of what validity is the appropriation?" *Id.* The benefits of sewage collection, transport and treatment are already enjoyed by all persons in the District's service area, the same persons who are assessed to pay for the District's service. Thus, the benefit does not inure solely to the District.

Not only is the District's use not beneficial, it may be no use at all. The sewage will continue to flow through the District's lines whether or not the appropriation application is

granted. The only "uses" the District can make of the effluent will arise at some time in the future, when it exchanges its new water right upstream or changes the discharge point to avoid release to the Jordan River. These future uses, to create revenue to the District or avoid costs, are not described in the application and should not be recognized as uses at all in this appropriation application.

### **III. THE DISTRICT DOES NOT NEED TO APPROPRIATE WATER TO CONTINUE ITS OPERATION**

The District is a quasi-governmental entity created by Title 17A of the UTAH CODE ANN. to, among other things, collect, treat, and dispose of sewage. It has authority to contract, sue and be sued, purchase, sell, condemn, bond, and tax. Through resolution and contract, it collects and conveys sewage and storm run-off to the large Central Valley Treatment Plant, of which it is a part owner. Its pipes intercept ground water, which is added to the volume conveyed. Then, under permit, the Central Valley facility discharges the treated product to the Jordan River.

The District is mistaken when it implies it must appropriate the water to convey the sewage simply because it is in its possession flowing through its pipes. For years, it has conveyed and treated sewage without "owning" the water right to do so. Other sewer districts do the same thing. Its authority to convey and treat the sewage and storm run-off is conferred through statute, which is sufficient for its purposes. What happens if the District is unable to appropriate the water it is conveying? Nothing, because it is operating by statute and a water right is not necessary to do so.

As previously noted, the obvious reason for the District to appropriate water is to file a change application. This also would explain why the District seeks a consumptive use right, although the treatment process itself consumes little, if any, water and would be more suited to a non-consumptive use application. The application seeks to appropriate water not for an existing use, which is already permitted by its authorizing law, but for a new, consumptive use not clearly defined in its application. Simply put, the District is attempting to position itself on equal ground with communities and districts already owning consumptive use water rights. Unfortunately, this quasi-governmental agency is not on that equal ground, and it cannot elevate itself to the position it seeks without treading on the property rights of private citizens.

#### **IV. THE WATER THE DISTRICT SEEKS TO APPROPRIATE IS NOT ABANDONED**

The District was created to collect, convey and treat its customers' sewage. It is authorized by statute to do so and charges a fee for its service. It does not simply happen on sewage and collect it for its own purposes and uses. Abandonment is a specific event that requires definite intent to surrender and release the water to the public and to relinquish the right to the use and ownership of the water rights. If the District wishes to claim that its customers have abandoned their water, it must file a complaint against its customers and pursue its allegations in court, not before the State Engineer. The Utah Supreme Court stated in *Smithfield West Bench Irr. Co. v. Union Central Life Ins. Co. et al.*, 195 P.2d 249, 253 (1948), "[i]t is axiomatic that one who claims that there has been an abandonment must allege and prove it."



However, pursuing abandonment against its customers may not be a good choice for the District. If the District's customers are found to have abandoned their water, presumably they have no further authority over it, and the statutory/contractual relationship between the District and its customers also may be severed. The State Engineer has no authority to declare the District's customers' water rights abandoned, and before abandonment is assumed, we should hear the views of the District's customers on the issue.

The District's abandonment claim is a circuitous argument to divert attention from the real issue: that there is no unappropriated water available in the Jordan River drainage. A person who claims or even proves that a right has been abandoned does not acquire that right. Water which has been abandoned or forfeited returns to the source and makes up downstream flow. UTAH CODE ANN. § 73-1-4(4)(b). If enough water eventually becomes "abandoned" or "forfeited," then water may become available in the source for appropriation, with a new water right number and a new priority date subsequent to all other existing water rights in the source.

The abandonment argument propounded by the District ignores the basic principle that the State Engineer must acknowledge in the appropriation process: the treated effluent returned to the Jordan River by the District is already appropriated by the Lower Jordan River Water Users. Whether the water is abandoned or not, it is still return flow which makes up the prior rights of the downstream users.

**V. APPROVAL OF THE DISTRICT'S APPLICATION COULD CAUSE  
A BREACH OF AN IMPORTANT AND LONG-STANDING CONTRACT**

On December 31, 1959, Jordan Fur and Reclamation Company, a member of the Lower Jordan River Water Users, entered into a contract with the Utah Fish and Game Commission, predecessor to the Utah Division of Wildlife Resources (the "Division"), to supply water to Farmington Bay. The contract provides that Jordan Fur will deliver a portion of its water rights to the Division for use at Farmington Bay, indicating the importance of these early priority water rights. It imposes an affirmative obligation for each party to "cooperate in opposing any application filed by a third party on waters from the Jordan River that may conflict with the above described water rights."

In reliance on the contract, the State of Utah expended thousands of dollars to develop an important wildlife area used for education, wildlife viewing, hunting, waterfowl nesting, and shorebird staging and migration. The water supplied by the contract is the major source for Farmington Bay. The contract acknowledged that the Division had filed applications to appropriate water in the Jordan River for Farmington Bay, but that when granted, the rights would be subject to Jordan Fur's rights.

If the District's application is granted, less water will be available for all water rights in the lower Jordan River, including the pending water applications of the Division for Farmington Bay. Jordan Fur's ability to meet its needs and supply water to Farmington Bay will be severely stressed.

**VI. APPROVAL OF THE APPLICATION WILL INTERFERE WITH WATER RIGHTS USED TO BENEFIT THOUSANDS OF ELECTRICITY CUSTOMERS**

PacifiCorp owns and operates the Gadsby Steam Electric Generating Station which has a water right to divert 7.78 cfs of water from the Jordan River. With an installed capacity of 241 MW, Gadsby generates 485 million kilowatt hours annually, enough to serve 68,000 homes and businesses throughout PacifiCorp's service territory. Built in 1949, Gadsby's power generation would cost millions of dollars to replace in today's market, if it could be replaced at all. PacifiCorp's customers have paid the costs of construction of this resource, and they should be able to continue to reap the benefits of having this low cost generation source available for their requirements.

• Depleting an additional 22.213 cfs from the Jordan River upstream from the Gadsby Plant would interfere year round with PacifiCorp's water rights. PacifiCorp would be forced to rely on expensive purchases of culinary water to continue generation. In addition, as greater amounts of water are diverted from the Jordan River upstream of the Gadsby Plant, the river becomes more polluted, rendering it unusable for Gadsby's needs, again resulting in the purchase more expensive culinary water.

**VII. THE DISTRICT'S APPLICATION SHOULD BE DENIED BECAUSE IT IS CONTRARY TO THE PUBLIC INTEREST**

Approval of the District's application is detrimental to the public interest in maintaining the wetland ecosystem associated with the Great Salt Lake. This wetland complex consists of

150,000 acres of developed, managed wetlands, 40,000 of which are managed by private hunting clubs. In many years, sufficient water to protect these wetlands and marshes is unavailable. Approving the District's application for another 22.213 cfs will further endanger the delicate balance of this important ecosystem.

The Great Salt Lake marsh has been recognized for its importance as a vital link migrational corridor for shorebirds. Several million birds use these wetlands every year during spring and fall migration, and they were designated as one of eleven Hemispheric Reserves and Four International Reserves only a couple of years ago. The ecosystem hosts 23 species of amphibians and reptiles, over 250 avian species and 64 species of mammals. Two endangered species, the peregrine falcon and bald eagle, and 19 sensitive species use the wetland area. Several avian species are found in their highest known concentrations in the Great Salt Lake ecosystem. For many others, it is their primary staging ground.

The maintenance and welfare of the delicate Great Salt Lake ecosystem is a matter of public concern. Any action which would be detrimental to the Great Salt Lake ecosystem would be contrary to the public interest and should be carefully considered. This delicate marshland is dependent on the water it receives from the Jordan River. Many of the Lower Jordan River Water Users maintain marshes, carefully timing their planting and irrigating to coincide with the conservation of the area and its wildlife. Further limiting the water available to these users with a long-standing history of maintenance and restoration would damage the ecosystem and be detrimental to the public interest.

Lastly, if the real purpose of the District's application is to position itself to exchange water out of Utah Lake to participate in water conservation plans pursuant to §207 of the Central Utah Project Completion Act of 1992, Pub. L. 102-575, 106 Stat.4600, the application should not be approved until NEPA compliance is completed.

### CONCLUSION

The District's application to appropriate 22.213 cfs of water from the Jordan River drainage should be rejected by the State Engineer in accordance with Utah law. The application attempts to appropriate water from an already over-appropriated source and cannot be granted without interfering with the prior rights of the Lower Jordan River Water Users. The District relies on a novel abandonment theory which it has not yet presented to the court, the appropriate forum to pursue its claim. The application does not state a beneficial use, and the District does not need an appropriation to continue its operation. In addition to interfering with the long-standing prior rights of the Lower Jordan River Water Users, approval of the District's application could cause interference with important contracts and disrupt electricity generation relied upon by millions of PacifiCorp customers, some of whom are the District's customers as well. Granting the application would violate the public interest, which the State Engineer is required to consider in his decision on the application. For these reasons, the Lower Jordan

River Water Users request that the District's application be denied.

RESPECTFULLY SUBMITTED this 29<sup>th</sup> day of March, 1996.

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## CERTIFICATE OF MAILING

The undersigned hereby certifies that a true and correct copy of the foregoing **MEMORANDUM OF PROTESTANTS LOWER JORDAN RIVER WATER USERS IN OPPOSITION TO APPLICATION** was mailed, postage prepaid, this 29<sup>th</sup> day of March, 1996, to the following:

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